

**LITTLE HOOVER COMMISSION**  
**Public Hearing on Boards, Commissions and Public Accountability**  
**December 8, 2004**

Outline of Testimony of  
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**RELEVANT BACKGROUND OF WITNESS IN DESIGNATED SUBJECT MATTER:**

- # Treatises (for example, *California Administrative and Antitrust Law*, with Professor Ralph Folsom; Butterworths 1996) and articles, including *A Theory of Regulation: A Platform for State Regulatory Reform*, 5:2 CAL. REG. L. REP. 3 (Spring 1985).
- # Drafting and sponsorship of regulatory-agency-related legislation (for example, bills creating remedies for violations of two of California's open meetings acts; State Bar discipline system reform; Medical Board enforcement program reforms, etc.).
- # Scholarship: Oversight of the Center for Public Interest Law's (CPIL) publication of the CALIFORNIA REGULATORY LAW REPORTER, which monitors the activities of California regulatory agencies, since 1980; teaching of law school courses in public interest law and practice, consumer law, and regulated industries since 1977.
- # Appellate litigation (22 cases relevant to consumer, unfair competition, and regulatory law) as a public prosecutor and private attorney.
- # Service as consultant to the California Law Revision Commission 1993-95 (regarding reforms to the Unfair Competition Act); membership on two regulatory boards; appointed by the California Attorney General as State Bar Discipline Monitor from 1987 to 1992; chair of the Board of Public Citizen Foundation in Washington, D.C. since 1992. In addition, CPIL staff have served as principal consultant to the Contractors=State License Board Enforcement Program; currently serving as Medical Board Enforcement Monitor.

## **WHEN ARE BOARDS AND COMMISSIONS NEEDED?**

This question necessarily involves three threshold inquiries: (a) when is state intervention in the market appropriate, (b) when is intervention by way of state agency **licensure** of competitors advisable, and (c) when is the **board or commission** (as opposed to a department or bureau) the optimum form of agency governance **C** where a licensing system is warranted.

### **I. State Intervention**

Markets as human constructs

Analysis of market flaws: natural monopoly; scarcity; imperfect (or misleading) information; adhesion contracts; external costs (pollution, safety hazards), including external costs accompanied by irreparable harm; external benefits

### **II. Licensure as a Form of Intervention**

Costs: Reduces supply, raises costs, hampers upward mobility, and reverses the American presumption by requiring the **prior restraint** of advance state approval

Benefits: May prevent **irreparable harm**, may inhibit damages where other remedies (*e.g.*, tort actions in court) are uncertain, costly, slow, and occur post-damage.

Some Criteria:

1. Is licensing necessary to prevent irreparable harm?  
(examples: new motor vehicle dealerships, landscape architects)
2. Will the need for repeat business and consumer awareness of incompetence adequately police the market by self-regulating mechanisms?  
(examples: barbers, dry cleaners)
3. Are those who rely on licensure in need of state pre-screening help?  
(examples: court reporters, petroleum engineers)
4. Can the state, in fact, ameliorate market flaws by advance screening?  
(examples: psychologists, proposed Astrology Board)

Options: **permits** vs. **certification**

Other Supplemental/Alternative Forms of Intervention:

- # Required bond or insurance; mandated advance disclosures; straight prohibition of a given practice or act enforced criminally; prohibition enforced civilly by public prosecutors; standard enforced by private suit; altered rule of liability for public or private enforcement (strict liability, *res ipsa loquitur*, altered standard of proof); facilitated access for court judgment (small claims court, private attorney general standing, class action status, standing latitude, attorney fee provision); tax incentive or disincentive; grant of monopoly power (exclusive franchise, patent, copyright); direct public reward or public financing; antitrust enforcement; restructuring/deregulation.

*See also* Government Code ' 9148 *et seq.* (Asunrise criteria@justifying creation of new regulatory agencies or new programs regulating previously-unregulated categories of trades/professions; *see also* Business & Professions Code ' 473 *et seq.* (Asunset criteria@upon which the necessity and/or performance of existing state regulatory programs are evaluated by the Joint Committee on Boards, Commissions and Consumer Protection).

### **III. The Board or Commission Form of Agency**

Distinctions between department/bureau and board/commission format

1. Application of Bagley-Keene Act, Govt Code ' 11120 *et seq.* (open meeting act/sunshine provisions)
2. Continuity between administrations (institutional memory)
3. Independence

Factors to Consider

1. Resources of agency
2. Need for expeditious decisions
3. Executive versus quasi-legislative character/importance to agency function
4. Value of group decisionmaking structure
5. Public importance of agency decisions and value to exposure/transparency

## **WHAT ARE THE KEY VARIABLES FOR EFFECTIVE BOARD PERFORMANCE?**

### **I. The Lodestar**

The fundamental dilemma of state regulation: **Reconciling expertise and independence.**

Why Expertise?

Why Independence?

### **II. Representation of the General Public**

The problem of occupational Atribalism@

Representation of the general public

1. Office of Ratepayer Advocates (ORA) Model
2. Intervenor Compensation (PUC and DOI) Model
3. Prior Work of the Little Hoover Commission (June 1998 report on Department of Consumer Affairs)

Special Funding

Funding through license renewals: viewed by the trade or industry assessed and by the Legislature as a proprietary charge to those regulated and increased only with their consent. The result has been trade/industry-imposed impotence on public protection enforcement (*e.g.*, the Medical Board has gone eleven (11) years without a fee increase, and its licensees pay three times their licensure renewal fees for public protection to their private local, state, and national trade associations for dues and private protection). For study of the consequences and public costs from such private deferral, see Fellmeth and Papageorge, Initial Report of the Medical Board Enforcement Monitor (November 1, 2004) at [www.cpil.org](http://www.cpil.org). Such fees should be paid into the general fund and allocated therefrom. They should approximate the costs of regulation, but should not be tied directly to the industry regulated as payers.

### **III. Rulemaking Flaws**

Review of Regulations by the Office of Administrative Law (OAL):  
The Necessity Standard Problem

Superfluous Requirements for the Rulemaking File

### **IV. Enforcement**

The Vertical Prosecution vs. Horizontal Hand-off Model

Interim Remedies *Pendente Lite*

### **V. Adjudications: APA and Judicial Review in Irrational Combination**

Problems with Current Five-Step System

Fewer Steps, Higher Quality

1. Quality of Administrative Law Judge (ALJ) decisionmaking enhanced; ALJs given access to experts to call in special cases; specialized ALJ panels where economies of scale warrant, decisions published to encourage consistency; ALJ decisions final C no board/agency review of ALJ decisions.
2. Judicial review by either superior court or court of appeal under substantial evidence test.
3. Discretionary petition to the California Supreme Court.

### **VI. The Problem of Nexus**

State A prior restraint (licensure) regulation is sometimes well justified, as with attorneys and physicians. Irreparable harm will come from the failure to provide relied-upon legal advice or medical treatment. Do such regulatory systems in fact address the real harms that flow from dishonest/incompetent practice? Examples: Does attorney regulation really assure the competence of a 58-year-old attorney giving immigration advice to a possibly deported

client? That assurance is provided exclusively through a single general examination administered to the attorney at the age of 25 C lacking any question concerning immigration law or most areas of actual practice. Does existing attorney regulation limit the lack of honesty, overbilling, and other abuses of the profession that flow from consumer reliance and adhesion?